

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHERYLL WHITE</b>	)	
Claimant	)	
VS.	)	
	)	
<b>DILLARDS, INC.</b>	)	Docket No. 259,194
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the March 6, 2001 Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

**ISSUES**

This is a claim for a repetitive use injury commencing July 8, 1998, and continuing through November 6, 2000. Claimant's Application for Hearing filed with the Division of Workers Compensation alleges injuries to the "lower back, right arm, elbow, shoulder, hip, leg and right foot."

After conducting a preliminary hearing on February 8, 2001, Judge Foerschler entered the March 6, 2001 Preliminary Decision denying claimant's request for temporary total disability benefits and additional medical treatment. The order reads:

After a preliminary hearing February 8, 2001, on issues of additional treatment and past due temporary total disability (from November 16 at \$296.00 per week), this matter was taken under advisement. The transcript and medical records were received, and no extrinsic evidence supporting claimant's belief that her back problems are work related is noted. According [sic], her application is denied at this time.

Claimant contends the Judge erred. Claimant argues that the greater weight of the evidence proves that she injured her low back and right upper extremity while working for

respondent. Therefore, claimant requests an order granting her temporary total disability benefits, medical treatment, and reimbursement for medical expenses totaling \$682.99.

Conversely, respondent and its insurance carrier contend the appeal should be dismissed as claimant failed to allege in her application for Board review that the Judge exceeded his jurisdiction. They also contend that the March 6, 2001 Preliminary Decision is not appealable to the Board at this juncture of the claim as requests for temporary total disability benefits and medical benefits are not "jurisdictional" issues that may be appealed from preliminary hearing orders.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the March 6, 2001 preliminary hearing order?
2. If so, was claimant's application for Board review legally sufficient to perfect the appeal?
3. If so, did claimant prove that she injured her low back or right upper extremity in an accident that arose out of and in the course of employment with respondent?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date, the Board finds:

1. Claimant worked for respondent in its distribution center. In August 2000, claimant advised her supervisors that she was unable to hang heavy garments because her right arm and shoulder were bothering her. Claimant testified that she began noticing symptoms in her low back and right upper extremity, which progressively worsened, for approximately three or four months before she reported her problems to her supervisors.
2. According to claimant, respondent referred her to a Dr. Smith who prescribed physical therapy and medications for her right upper extremity and low back and, also, referred her on to Dr. F. Daniel Koch at Johnson County Orthopedics, P.A. A copy of Dr. Koch's September 7, 2000 office notes are contained in the record and those notes indicate that the doctor reviewed x-rays and an MRI that showed degenerative changes and disk disease. Dr. Koch also recorded in claimant's history that claimant's work activities tended to aggravate her pain.

Cheryll White [claimant] is a 49-year-old lady who has basically complaints of two problems, lower back pain as well as her right shoulder. This has been going on for a fair amount of time. She does not recall any specific injuries, but she does the kind of work that tends to aggravate her pain. No

real weakness, numbness, bowel, or bladder problems. The pain in the shoulder is worse with activities, particularly overhead. . . .

That same medical record also indicates that the doctor believed claimant had a right shoulder pathology and that he recommended a shoulder injection and further testing.

3. But Dr. Koch did not have the opportunity to complete his recommended treatment and testing as on September 18, 2000, respondent's insurance carrier advised claimant that she should not return to Dr. Koch. Instead of providing treatment from Dr. Koch, respondent's insurance carrier wanted a second opinion from Dr. David J. Clymer, whom claimant eventually saw on November 6, 2000.

4. Between the period from September 18 through November 6, 2000, claimant sought medical treatment from the University of Kansas Hospital's emergency room. The emergency room referred claimant to Dr. Milligan, who referred her on to a neurosurgeon for additional evaluation. A document from Kansas University Physicians, Inc., dated October 23, 2000, and signed by Dr. Milligan, contains a history that claimant's work activities included a lot of heavy lifting and prolonged standing.

. . . works as processor in distribution center, lots of heavy lifting, standing long periods.

5. The preliminary hearing record also contains a radiology report from an October 9, 2000 lumbar spine examination. The results from that examination indicate that claimant has a very mild lumbar scoliosis with transitional vertebrae at L5-S1.

6. On October 30, 2000, claimant saw Dr. Steven B. Wilkinson, who found that claimant had decreased range of motion in the lumbar spine and also found some paraspinal muscle spasm. Dr. Wilkinson recommended an MRI to determine whether claimant would be a surgical candidate or whether some other treatment would be appropriate. But claimant was unable to personally pay for that MRI and, therefore, it was not done.

7. Claimant then saw Dr. Clymer on November 6, 2000. After a somewhat questionable examination, Dr. Clymer found that claimant had generalized soft tissue complaints involving the neck, right shoulder, right arm, mid back, low back, right hip and right leg which did not appear to be directly related to any specific work-related activity or injury. In a November 6, 2000 letter to respondent's insurance carrier, the doctor stated, in part:

Ms. White presents with generalized soft tissue complaints involving the neck, right shoulder, right arm, mid back, low back, right hip and right leg, **which are non specific and do not appear to be directly related to any specific work related activity or injury.** Her shoulder symptoms seem

compatible with mild myositis and there may be some component of mild rotator cuff tendinitis. However, I find no evidence of a rotator cuff tear, nor a significant bony injury, nor any other pathology which would be benefited [sic] by interventive measures. Similarly, the low back and buttock discomfort seems most compatible with mild lumbar myositis. Her subjective sense of leg irritability could be compatible with nerve root entrapment, however, her MRI study does not reveal evidence of any compressive lesion and my objective neurologic assessment reveals no evidence of radiculopathy. Consequently, I find only evidence of mild diffuse subjective myositis and mild tendinitis involving the right shoulder. **I cannot relate these symptoms directly to any specific work related activity or accident.** While it is possible that repetitive lifting or bending may have caused some temporary aggravation to such a myositis syndrome, **I cannot define any activity at work which would have resulted in a prolonged soft tissue problem explaining her symptoms over the past six months.**

...

To a reasonable degree of medical certainty, I feel Ms. White has mild diffuse myositis, **which is not directly the result of any specific work related incident or accident.** . . . (Emphasis added.)

According to claimant, without taking blood tests, Dr. Clymer suggested that claimant might have lupus.

8. Respondent and its insurance carrier introduced Dr. Clymer's report into the preliminary hearing record. Claimant failed to introduce any medical opinion that directly contradicts Dr. Clymer's opinions regarding the cause of claimant's symptoms.

9. Before claimant's visit with Dr. Clymer, respondent had accommodated her work restrictions. But once Dr. Clymer determined that claimant did not need any specific work restrictions, claimant was expected to return to her regular work duties. Claimant did not believe she could perform that work and respondent placed her on a leave of absence. Claimant's last day of work for respondent was November 6, 2000. Since leaving respondent's employment, claimant has looked but has been unsuccessful in finding work that she believed she could physically perform.

#### CONCLUSIONS OF LAW

1. The Preliminary Decision should be affirmed.

2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.<sup>1</sup> And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.<sup>2</sup>

3. Claimant's uncontroverted testimony regarding the November 6, 2000 examination brings into question Dr. Clymer's motives and the weight that his testimony should be given. But given the fact that Dr. Clymer's causation opinions are the only ones from a physician contained in the record, the Board concludes that claimant has failed to prove that her right upper extremity and low back symptoms and injuries were caused by her work activities.

4. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>3</sup>

5. Respondent and its insurance carrier's argument that the Board did not have jurisdiction to review the March 6, 2001 Preliminary Decision is without merit. From the language used in that order, the Judge determined that claimant failed to prove that she injured her back at work, which is a preliminary hearing finding that the Board has the jurisdiction and authority to review.<sup>4</sup>

6. Respondent and its insurance carrier have also argued that claimant's appeal should be dismissed as claimant failed to state in her request for review that the Judge exceeded his jurisdiction. The Board disagrees. Claimant's request for Board review, which was a letter from claimant filed with the Division on March 19, 2001, generally set forth claimant's contentions and the basis for her appeal. The second and third paragraphs of the letter read:

I requested temporary relief for medical treatment and workers compensation. Judge Foerschler has denied any relief for injuries sustained to my lower back, however, he did not address my right should[er] and arm in his ruling. I never experianced [sic] any problems with my lower back or right shoulder and arm prior to my employment with Dillard's Distribution Center.

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<sup>1</sup> K.S.A. 44-501(a).

<sup>2</sup> K.S.A. 44-508(g).

<sup>3</sup> K.S.A. 44-534a(a)(2).

<sup>4</sup> See K.S.A. 44-534a.

I personally submit this correspondence [sic] appealing the preliminary order because my attorney will not. I received some instruction regarding the appeals process from the Kansas, Department of Human Resources.

The Board finds that the letter sufficiently informed both the opposing parties and the Division of the desire to appeal the Judge's preliminary hearing decision and included enough information to identify the jurisdictional issue that was being appealed, to wit: whether claimant injured her lower back and right upper extremity while working for respondent. In this instance, the Board finds such letter was sufficient to appeal the preliminary hearing order and satisfy the Act's various requirements.<sup>5</sup>

**WHEREFORE**, the Board affirms the March 6, 2001 Preliminary Decision entered by Judge Foerschler.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2001.

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BOARD MEMBER

c: Cheryll White, 6604 Englewood, Raytown, MO 64133  
Curtis L. Hursh, Kansas City, MO  
John Graham, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director

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<sup>5</sup> See K.S.A. 44-534a, K.S.A. 44-551(b)(2)(A), and K.A.R. 51-18-3.